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FEDERAL COMMUNICATIONS COMMISSION  
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### **Spectrum Set-Aside**

1. Several Commenters have proposed a specific allocation of one-half of the subject spectrum for educational and non-commercial use. These Commenters further suggest that they would hold the allocated spectrum "in trust" for educational and non-commercial use.

2. It should be noted that the Commission specifically allocated the ITFS channels for educational purposes, and in most instances, allocation of these ITFS channels has resulted in excess channel capacity which is leased to commercial operators. These same Commenters currently lease "excess channel capacity" to commercial operators and propose that the Commission allow the educational institutions to "lease any excess channel capacity" if granted a subsequent educational set-aside of 28 GHz spectrum.

3. It would appear that certain of these Commenters are more interested in generating channel lease income rather than the use and operation of spectrum for delivery of educational programming. In the majority of instances, these institutions are leasing channel capacity because they cannot fully utilize existing grants of ITFS channel capacity. A specific set-aside to grant additional spectrum to these institutions would only result in creating additional excess channel

*educational purposes should not result in the set-aside of additional channels in the 28 GHz Band.*

5. M3ITC clearly recognizes that all licensees delivering video programming to the general public, including 28 GHz licensees, have a social responsibility to provide a reasonable level of educational programming to its subscribers. Socially-responsible licensees will provide educational programming; the Commission can either mandate minimal levels of educational programming or incorporate educational programming criteria into its general license renewal criteria for 28 GHz. An example of this approach is a Commission requirement that the commercial licensees provide a certain amount of broadcast time or provide access to two or three channels at cost to educational institutions - a type of "reverse ITFS" lease situation. The Commission has recently reviewed and released revised educational programming criteria for network broadcast licensees, and this may be one way to provide educational programming at 28 GHz. M3ITC believes that this is the proper way to influence, accommodate and deliver educational programming. Creation of additional educational excess capacity for educational institutions for subsequent lease to third parties is not in the public interest and should not be an objective of the Commission.

#### **Structure of 28 GHz Band**

6. Many Commenters, including M3ITC, believe that the Commission's proposal to segregate the spectrum into two 1000 megahertz bands ("A-Band" and "B-Band") will allow for the development of a diverse and competitive delivery of services to the public. Although some Commenters support four 500 megahertz bands

7. The sentiment of both the Commission and Commenters indicates that video distribution will most likely be the initial service offered by many system licensees, while other services and technologies are developed. Furthermore, development of the video distribution service will allow the internal development of funds for expansion of other services.

8. Since current sentiment favors development of video distribution services to compete with existing technologies such as cable and MMDS, we believe that these licensees will need the entire 1000 megahertz of spectrum allocation contemplated by the Commission to compete effectively with these established services. As has been noted with recurring frequency, wireline cable companies expect to offer two-way interactive communication and are exploring use of existing cable plant

and Motorola Iridium projects. If this suggested relocation is made, the Commission's requirement to develop adequate coordination and sharing criteria between the satellite service and B-Band licensees would become moot. Lastly, if the Commission proposes to allow the A-Band and B-Band licensees to compete with one another, as well as existing service providers, reassignment of spectrum for satellite service would eliminate a potential competitive disadvantage to the B-Band licensee due to lack of contiguous spectrum.

### **Technical Issues**

11. The Commission and Commenters both recognize that the capabilities of LMDS will evolve over time. M3ITC concurs with other Commenters that the Commission adopt limited technical standards and regulations at this time. Several Commenters, particularly Video/Phone, U.S. Telephone Association and Technology Engineering Company, have expressed reservation of the high density multi-cell approach advocated by Suite 12. We believe there is merit to these concerns. As more fully discussed in Paragraph 42, M3ITC recommends the Commission investigate and allow alternative technologies if the reservations expressed by these Commenters prove correct.

12. Limited technical standards, coupled with A-Line/B-Line competition, will allow (or in some cases, force) the serious providers of these services to achieve inter-system compatibility, and in some cases, may lead to a sharing of infrastructure costs. We recognize that as the services mature, compatibility and interconnect issues will also emerge. M3ITC believes that LMDS licensees will (indeed must) work and cooperate with the appropriate technical societies and associations to resolve these compatibility and interconnect issues, as well as help establish the technical standards for pending 28 GHz services. As the Commission allowed industry to develop its own standards in cellular telephone, we believe this approach is also appropriate for LMDS.

### **Regulatory/Licensing Issues**

13. **Status of Licensees.** Virtually all Commenters support nominal technical regulations and standards to allow 28 GHz licensees to develop a variety of services as quickly as possible. Most Commenters also agree with the Commission's proposal to allow the licensee to select its status on a channel-by-channel, cell-by-cell basis. M3ITC recommends that the Commission designate a single branch or division to manage and coordinate the common carrier/non-common carrier elections and avoid the coordination issues of MMDS.

14. **Service Areas.** The vast majority of Commenters, including M3ITC, expressed disagreement with the Commission's proposed large service areas, such as Basic Trading Areas or Major Trading Areas. M3ITC continues to believe that smaller market areas, such as PMSAs, and smaller MSAs and RSAs be designated as service areas. The Commenters recognize the financial challenges of covering huge, non-congruous geographical areas. If rapid system development, build out and deployment for market coverage is a primary objective of the Commission, we believe that smaller market areas are more manageable for the majority of the small business licensees, resulting in greater market coverage being attained in the shortest period of time.

15. The Commission can look to Cellular Telephone markets for guidance on establishing potential market parameters. Here, many wireline and non-wireline licensees were unable to complete system build out even with a five year construction permit. This is indicative of the cost of buildout of medium-sized service areas. If the Commission chooses to establish even larger service areas, greater capital deployment will be required and the more remote areas will not receive service for years (If at all, since by adopting a percentage market coverage for the larger metropolitan areas, *outlying areas would not have to be served*. Applying the same percentage coverage to a smaller market

16. Definition of larger market areas would also serve to eliminate or disqualify the sincere applicant entrepreneurs wishing to enter the LMDS industry because of because of the significantly greater financial requirements for system build out. We believe that LMDS will be successful, build out expedited and the public interest best served if the markets are smaller in nature and therefore more manageable to the small business operators.

17. Service of Minimum Areas and/or Populations. Few Commenters requested the Commission to define its concept of "Service." Understanding that the Commission is inclined to adopt minimal technical regulations, M3ITC still believes the Commission should provide guidance to applicants as to whether "service" means merely providing video distribution services *or the offering of many services*, such as two-way voice, video and data services, teleconferencing, etc. If the Commission requires the offering of many services, then clearly an extended construction period is in order. If, however, the Commission defines video distribution as the mandatory service with other telecommunications services ancillary to video distribution, or allows market forces to dictate the service(s) offered by the licensees, then it should consider the staged construction schedule as described in Paragraph 18.

18. Several Commenters suggested that the Commission's ninety percent (90%) market coverage within three years to be impractical. We concur, and believe the Commission can look to its Interactive Video and Data Services ("IVDS") construction and service rules: ten (10) percent, thirty (30) percent and fifty (50) percent by the end of construction permit years one, three and five, respectively. M3ITC believes that a staged buildout requirement such as that of IVDS, with similar coverage increments up to ninety (90) percent in year nine, will more likely be met (and exceeded), especially if the market service areas are smaller in nature. By setting achievable minimum construction and system buildout requirements, coupled with manageable service areas, the Commission will promote rapid service deployment. As a practical



matter, however, M3ITC also recognizes that market forces will probably determine a greater rate of system construction and market

interests in cable television companies and have been authorized to provide "video dialtone" services provided they meet fiber optic plant expansion.

22. The Commenters concur with the Commission that 28 GHz presents a viable competitive alternative to existing providers of video distribution, two-way voice, video and data services. However, failure to adopt cross-ownership restrictions may result in the following:

1) Wireline cable companies will control both hard wire delivery of video programming and wireless broadcast of video programming. These cable companies have not been able to provide existing hard wire video programming on a competitive basis except in the rare overbuild situation. This became such a great problem that Congress is attempting to control perceived abuses through the Cable TV Consumer Protection and Competition Act of 1992, P.L. 102-385. Allowing the wireline cable companies to own a second delivery system, which might otherwise provide healthy competition to its wireline services, would not foster competition or serve the best interests of the public.

2) Wireline telephone companies currently provide all forms of telephony, including video teleconferencing. Wireline telephone companies have also been granted the authority to deliver video services, provided they meet certain plant expansion criteria. If the wireline telephone companies are allowed to provide 28 GHz services which compete with their existing capabilities and authorizations, there is less likelihood that these services will be provided on a competitive basis. Additionally, if granted alternative delivery capability, the wireline telephone companies may not develop the "fiber optic telecommunications highway" as envisioned by the Commission and the current Administration. Allowing the wireline telephone companies to own a second delivery system which might otherwise provide healthy

competition to its telecommunications and video dialtone services would not create a competitive environment, nor would a telecommunications near-monopoly be in the best interests of the public.

23. Several Commenters also recommended the Commission consider cross-ownership bans for MMDS and 28 GHz licensees serving the same market areas. As noted earlier, one of the initial uses of the 28 GHz spectrum will be to provide video distribution services, followed by interactive services. With the proper investment, current MMDS operators can utilize channel compression and provide these same services with existing assigned spectrum.

24. **Selection from among Mutually Exclusive Applicants.** The majority of the Commenters propose the Commission use random selection. M3ITC also believes the random selection process to be most equitable to the innovative entrepreneur. The large capitalized

Comments as expected, requests competitive bidding which would

perhaps these services do not constitute a media of mass communication. If these services on whole do not constitute a form of mass media, then diversity and minority preferences would not be appropriate for LMDS.

26. Settlements. M3ITC continues to support the Commission proposal forbidding any settlements among applicants for LMDS, and any alienation of interest in an application for LMDS. We believe this policy may help to eliminate the insincere applicants from applying for LMDS licenses.

27. License Term and Transfer of Control/Assignment. Many Commenters recognize the problem of ensuring that only sincere applicants interested in constructing and operating LMDS systems apply for operating authorities. M3ITC continues to support a minimum five (5) year prohibition on system sale or transfer. We believe sincere applicants interested in system development and operation, as well as Commission staff, would welcome an extended ban on license transfer. M3ITC believes this extended ban on sale or transfer would frustrate applicants with no sincere intent to develop and operate a system and act as a possible deterrent to such insincere filings. We further believe that the Commission will be able to address extenuating circumstances, such as change in control due to death or financial difficulties, on a case-by-case basis.

costs associated with system development and buildout; indeed, the licensees must have some reasonable expectation of capital recovery and ability to internally fund research and development programs to maintain continued competitiveness.

29. Application Requirements. The Commission's discussion focuses in part on the need to most effectively utilize Commission resources. Many Commenters are in favor of a streamlined application process; M3ITC recommends a "post-card" type application, similar to that adopted for IVDS applications. The Commission experienced this type of post-card filing with the first nine IVDS filings, coupled with higher application fees. This greatly reduces the "review burden" on the Commission's resources, and will allow the Commission to review the Tentative Selectee's carefully prepared application, resulting in fewer processing delays. It is hoped that this filing approach and a \$500 initial filing fee would minimize the role "application mills" might otherwise play in generating hundreds, if not thousands of insincere applications.

30. M3ITC also believes the Commission should grant the Tentative Selectee the opportunity to amend its application if any errors are discovered in its filings. The Commission's primary objective is to identify sincere applicants, not disqualify a sincere applicant due to a clerical error or unintentional omission.

31. The Commission should also adopt rules regarding challenges to the Tentative Selectee. The Commission has endeavored to discourage frivolous challenges and filings more better described as "delaying tactics" to system construction and development; M3ITC hopes these policies will also be extended to LMDS.

32. One-to-a-Market. Commenters agree with the Commission's position on a one application per market area, but request clarification if the limitation is one application per market or one application per A-Band and one application per B-Band.

33. Few Comments suggested that interests in bona fide publicly-held corporations be limited to something less than one-half of one percent. We understand that these "publicly-held" interests are subject to abuse by application mills and wish to eliminate as many insincere filings as possible.

34. Financial Showing. Several Commenters suggested that the Commission's proposed rules for financial showing appear far more strict than necessary. In fact, it appears that the Commission's proposed rules on financial showing would eliminate all but the largest applicants and serve to eliminate most of the small business applicants.

35. The Commission predicates its financial showing commitment based in part on the responsibility each licensee would have to serve a large area. As noted by virtually all Commenters, the proposed "mega" service area of BTAs or MTAs is simply too large. The Commenters believe the public interest would be more readily served by defining smaller market areas, and therefore a relaxed financial commitment standard would be within reach of more applicants. And as noted by Commenters, if the Commission maintains its position on defining larger service areas, it effectively eliminates all but the largest applicants *from even qualifying for filing status*.

36. Construction Requirement. Few Commenters supported the Commission's proposed single construction benchmark: 90% population coverage within three years. The majority of the Commenters believe this construction requirement is not reasonably achievable. We agree with the Commission that the public should be served expeditiously. However, as a sincere applicant seeking an LMDS operating authority, M3ITC and all other similarly situated applicants will need some time and experience to develop and implement a system which maximizes both market coverage and the efficient use of equipment deployment.

### **Pending Applications**

37. Joseph D. Carney & Associates raises valid Comments regarding these filings of applicants most interested in providing 28 GHz services. The Commission proposes to deny all waiver applications pending before it and M3ITC disagrees with this proposed action. The Commission has already accepted for filing and placed on Public Notice many of these applications. The Commission has already announced the deadline for filing a Pioneer Preference. The Commission has led applicants to believe that these applications passed a cursory technical review by placing these applications on Public Notice. M3ITC believes *the Commission has a duty to review each application and determine the merits of each application*. At a minimum, the Commission cannot adopt a policy of arbitrarily denying applications.

38. Many of the applicants have filed timely Petitions for Reconsideration. M3ITC urges the Commission to review these timely-filed Petitions to see if there is a basis for distinguishing among any of the individual waiver requests in an equitable fashion. If the Commission then determines that there are engineering defects or application preparation defects and deficiencies in respect of the applications, it should so state, on an application by application basis.

39. M3ITC believes the Commission should allow the applicants who filed timely Petitions for Reconsideration the opportunity to amend or otherwise correct those applications previously submitted to the Commission. Some of the applicants can distinguish the sincerity of their intent, as evidenced by additional application for Pioneer's Preference and Experimental Authorizations.

40. M3ITC believes criteria does exist for the Commission to differentiate among the many waiver requests it received and processed on Public Notice. The Commission has proposed to deny these applications because they do not conform to the service concept or technical parameters proposed in the NPRM. Since these concepts and

parameters are not finalized, we request the Commission to again review its position with respect to those timely-filed Petitions and if so warranted, allow these applicants to amend their applications to conform to the Commission's rules and regulations as adopted and again review the applicants' requests for waivers.

41. Commenter Joseph D. Carney & Associates suggests the Commission grandfather and/or grant certain waiver requests. We





Paragraph 11). Each have expressed reservation of the high density multi-cell approach advocated by Suite 12. M3ITC believes the Commission has a duty to evaluate alternative technologies, and recognition and protection of technological investment by interested, motivated Experimental License holders and Pioneer Preference Applicants will help serve the public interest.

43. Suite 12 has not demonstrated whether its technology is appropriate for the vast majority of the United States markets, and if its technology is not suited for the majority of the markets, then the general public-at-large will not benefit and the public interest will not be served.

#### **Proposed Rule Amendments**

44. M3ITC has previously submitted its Comments on the Proposed Rule Amendments promulgated by the Commission. M3ITC requests the Commission examine the impact of its proposed Amendments and rule changes on small business entities and incorporate the Comments received from interested parties. M3ITC has previously submitted

M3ITC respectfully requests the Commission to evaluate both the initial Comments and Reply Comments received as part of this initial Rule Making process and issue a Second Notice of Proposed Rulemaking to